

**In the District Court of the United States
for the Southern District of Indiana,
Indianapolis Division**

CIVIL ACTION No. 781

**HARRY A. PARKER, DOING BUSINESS AS PARKER
MOTOR FREIGHT, ET AL., PLAINTIFFS**

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

**JURISDICTIONAL STATEMENT BY DEFENDANT-APPÉL-
LANTS UNDER RULE 12 OF THE REVISED RULES OF THE
SUPREME COURT OF THE UNITED STATES**

The defendant-appellants respectfully present the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

A. STATUTORY PROVISIONS

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, see, 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539, as amended March

3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

B. THE STATUTE OF A STATE, OR STATUTES OR TREATY OF THE UNITED STATES, THE VALIDITY OF WHICH IS INVOLVED

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

C. DATE OF THE JUDGMENT OR DECREE SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THE APPLICATION FOR APPEAL WAS PRESENTED

The decree sought to be reviewed was entered on June 30, 1944. The petition for appeal was presented and allowed on August 1, 1944. On the same day an assignment of errors was filed.

D. NATURE OF CAUSE AND RULINGS BELOW.

This is an appeal from a final decree of a specially-constituted three-judge District Court

of the United States for the Southern District of Indiana, Indianapolis Division, entered June 30, 1944, declaring an order of the Interstate Commerce Commission illegal and void and enjoining its enforcement. The order in question was entered by the Commission on September 25, 1943, in a proceeding known as *The Willett Company of Indiana, Inc., Extension—Fort Wayne-Mackinaw City, Mich.*, Docket No. MC 2815 (Sub. No. 6), reported 42 M. C. C. 721. This proceeding was an application by The Willett Company for a certificate of public convenience and necessity under Sections 206 (a) and 207(a) of the Interstate Commerce Act. Authority was sought to inaugurate over seven specified routes a trucking service auxiliary to and supplemental of, the rail service of the Pennsylvania Railroad in the transportation of less-than-carload freight. Compare *Thomson v. United States*, 321 U. S. 19, 20, 21.

By its report and said order of September 25, 1943, the Commission found that the present and future public convenience and necessity required the proposed operation, subject to conditions designed to restrict it to a coordinated motor-rail service, and directed that an appropriate certificate issue.¹ Subsequently a petition for reconsideration filed by protestants was considered and

¹ By agreement the issuance of the certificate was subsequently deferred pending the disposition of the proceeding in the District Court.

denied by the entire Commission by order dated February 8, 1944.

On February 21, 1944, suit to set aside this order, pursuant to the provisions of Section 41 (28) and Sections 43 to 48, inclusive, of Title 28 U. S. C., was filed by Harry A. Parker, doing business as Parker Motor Freight, a motor carrier protestant in the Commission proceeding. Several other motor carriers, The Regular Common Carrier Conference of the American Trucking Associations, Inc. and Motor Carriers Central Freight Association intervened as parties plaintiffs. The Interstate Commerce Commission, The Willett Company of Indiana, Inc., and The Pennsylvania Railroad Company intervened as parties defendant. The case was submitted on final hearing on April 28, 1944, before a specially constituted three-judge court.

The substantial issue before the Court was whether the Commission had applied the proper legal criteria in reaching its determination that public convenience and necessity required the grant of the authority sought.

As of June 30, 1944, without filing any written opinion, the Court filed its special findings of fact and conclusions of law and entered its final decree enjoining the enforcement of the Commission's order. In so doing it found applicant had failed to meet the statutory requirements and that the Commission had failed to exact from the applicant, as a railroad subsidiary, the requisite

proof to establish public convenience and necessity and that there was no substantial evidence to support the order.

The question presented by this appeal is a substantial one in that it involves the validity of the basis upon which the Commission has acted in numerous applications involving the substitution of motor-truck service for local less-than-carload way freight service by rail carriers. A decision upon this issue is especially necessary to the proper performance of the Commission's administrative duties since it is now faced with a decision of the District Court for the Eastern District of Virginia which in a recent opinion, filed July 17, 1944, in *American Trucking Association et al. v. United States*, No. 285, sustained an order granting similar operating rights to the Seaboard Air Line Railway.

E. CASES SUSTAINING THE SUPREME COURT'S JURISDICTION ON APPEAL

United States v. Carolina Freight Carriers Corp., 315 U. S. 475.

Alton Railroad Co. v. United States, 315 U. S. 15.

Noble v. United States, 319 U. S. 88.

Crescent Express Lines v. United States, 320 U. S. 401.

Board of Trade of Kansas City v. United States, 314 U. S. 534.

Union Stock Yard Co. v. United States, 308 U. S. 213.

United States v. Pan American Petroleum Corp., 304 U. S. 156.

United States v. American Sheet & Tin Plate Co., 301 U. S. 402.

United States v. Baltimore & Ohio R. R. Co., 293 U. S. 454.

Mississippi Valley Barge Co. v. United States, 292 U. S. 282.

**F. DECREE AND FINDINGS OF FACT AND CONCLUSIONS
OF LAW OF THE DISTRICT COURT**

Appended to this statement is a copy of the findings of fact and conclusions of law of the District Court and a copy of decree of said court sought to be reviewed.

We, therefore, respectfully submit that the Supreme Court of the United States has jurisdiction of the appeal.

Dated August 22, 1944.

DANIEL W. KNOWLTON,

Chief Counsel,

DANIEL H. KUNKEL;

Attorney for Interstate Commerce Commission.

HARRY E. YOCKEY,

KIRKWOOD YOCKEY,

For Willett Company of Indiana, Inc.

H. Z. MAXWELL,

for A. M. DONNAN,

H. Z. MAXWELL,

for OSCAR LINDSTRAND,

H. Z. MAXWELL,

for H. Z. MAXWELL,

H. Z. MAXWELL,

for JOHN DICKINSON,

For The Pennsylvania Railroad Company.

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SPECIAL FINDINGS OF FACT

Pursuant to Rule 52 of the Rules of Civil Procedure, this Court now states its Special Findings of Fact:

I.

This is a suit brought under U. S. Code, Title 28, Chap. 2, Sec. 41 (28) and Sec. 43-48, inclusive, to set aside an order made September 25, 1943, by the Interstate Commerce Commission authorizing the issuance of a motor carrier certificate of convenience and necessity in a proceeding entitled The Willett Company of Indiana, Inc., Extension—Fort Wayne—Mackinaw City, Mich., Docket No. MC-2815 (Sub. No. 6). The plaintiffs in this suit are motor carriers who are competitors of the above-named applicant with respect to the operations authorized by the proposed certificate and associations of motor carriers.

II

An application was filed with the Interstate Commerce Commission by The Willett Co. of Indiana, Inc., a subsidiary of the Pennsylvania Railroad, on September 8, 1941, under the provisions of Section 207 (a) of Part II of the Interstate Commerce Act. This application was for authority to conduct seven separate operations on as many different routes paralleling the lines of the Pennsylvania Railroad from Fort Wayne, Indiana, to Mackinaw City, Michigan. Numerous competing motor carriers intervened and opposed the granting of the authority sought. Hearings were held and a proposed report was filed. Exceptions and a Petition for Rehearing and Reconsideration were denied. Suit to set aside said order was filed on February 21, 1944. Answers were duly filed on behalf of the United States, the Interstate Commerce Commission; and intervenors. Argument was had and the cause submitted on final hearing on April 28, 1944. At the hearing, plaintiff introduced in evidence a certified copy of the record before the Interstate Commerce Commission. This was all of the evidence in the case.

III

The operations proposed are motor carrier operations which would be competitive with existing motor carrier service. The railroad, however, refused to make use of any of the existing lines.

The applicant's proof concerned an alleged improvement in railroad service. No proof was made or offered by the applicant or presented in evidence that present highway common motor carrier transportation service by duly certificated carriers operating in interstate or foreign commerce and serving the points proposed to be served by the applicant was or would be inadequate to serve the public need therefor. Proof was presented before the Commission by the plaintiff and other protestants concerning the adequacy of existing common motor carrier service. There was no substantial evidence to prove public convenience and necessity.

CONCLUSIONS OF LAW

Upon the above and foregoing Special Findings of Fact, the Court now states its Conclusions of Law, as follows, to wit:

I

The Court has jurisdiction of the subject matter and of the parties in this cause of action.

II

The applicant did not meet the statutory requirements and the Interstate Commerce Commission failed to exact from applicant, as a railroad subsidiary, the requisite proof to establish public convenience and necessity.

III

There was no substantial evidence to support the order of the Interstate Commerce Commis-

sion that public convenience and necessity requires the issuance to applicant of a certificate of public convenience and necessity authorizing operation by motor vehicle as a common carrier of property over the routes involved, and the order is, therefore, illegal and void and should be permanently enjoined.

SHERMAN D. MINTON,

Judge, U. S. Circuit Court of Appeals.

ROBERT C. BALZELL,

Judge, United States District Court.

LUTHER M. SWYGERT, per R. C. B.,

Judge, United States District Court.

Dated this 30th day of June, 1944.

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DECREE

This cause coming on now to be finally heard by the Court, and the parties appearing by their respective attorneys, and the Court having heard the evidence and the argument of counsel and being sufficiently advised in the premises, now, pursuant to Rule 52 of the Rules of Civil Procedure, signs and files herein its special findings of fact and states its conclusions of law thereon, which said special findings of fact and conclusions of law are ordered by the Court filed and made a part of the record in this cause, all of which is now done.

It is Therefore Ordered, Adjudged and Decreed by the Court that the order made and entered by the defendant, Interstate Commerce Commission, as of September 25, 1943, in its Docket No. MC 2815 (Sub No. 6), entitled The Willett Company

of Indiana, Inc., Extension—Fort Wayne—Mackinaw City, Mich., complained of in the complaint, is illegal and void, and the defendants, United States of America and Interstate Commerce Commission, and their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them, who receive actual notice of this order by personal service or otherwise, should be and they are hereby permanently enjoined and prohibited from enforcing or attempting to enforce the same in any manner.

Dated this 30th day of June, 1944.

SHERMAN D. MINTON,
Judge, U. S. Circuit Court of Appeals.

ROBERT C. BALTZELL,
Judge, U. S. District Court.

LUTHER M. SWYGERT,
Judge, U. S. District Court.